some procedural delays,[163] the FCC ultimately concluded that its forbearance policy was both lawful and in the public interest. In particular, the Commission determined that permissive detariffing had stimulated competition and granted consumers more flexibility with respect to the price and type of services available as well as greater choice regarding the selection of carriers. The Commission reasoned that without forbearance, the subsequent imposition of burdens upon, for example, cellular licensees would frustrate the goals of the Communications Act.[164]

Recently however, the District of Columbia Court of Appeals issued a decision in *AT&T v. FCC*,[165] effectively ruling that the Commission does not have legal authority to forbear from requiring nondominant common carriers to file tariffs for interstate communications services. As a result of the decision in *AT&T v. FCC*, federal tariffing requirements will also be extended to the full range of common carriers, including -- for the first time -- cellular licensees such as McCaw. Private carriers, however, are not subject to any tariffing obligations. The *AT&T v. FCC* decision thus provides new PCS participants, if

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[163] The Commission subsequently issued a Notice of Proposed Rulemaking to review the lawfulness and future application of its forbearance rules and policies. *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 804 (1992). In a companion order adopted the same day, the Commission denied AT&T's complaint in part and dismissed it in part, concluding that MCI should not be liable to AT&T for actions that were consistent with Commission rules and that the proper procedural vehicle for considering changes in the forbearance rule was a rulemaking proceeding since such a decision would profoundly affect the regulation of the interstate marketplace. *See AT&T v. MCI*, 7 FCC Rcd 807 (1992).

[164] Report and Order, FCC 92-494, adopted November 5, 1992. Pursuant to an Order released November 25, 1992, FCC 92-524, the Commission stayed the Report and Order pending further litigation in the *AT&T v. FCC* case.

[165] *American Telephone and Telegraph Co. v. FCC*, slip. op., C.A. No. 92-1053 (D.C. Cir. Nov. 13, 1992) ["Slip Op."].

licensed as private carriers, with yet another advantage over the PCS offerings of common carrier cellular providers.

If a disparate regulatory scheme is condoned by the Commission, the impact of the *AT&T v. FCC* decision will detrimentally affect competition. First, common carriers will face delay and costs in responding to market changes. Even before the *AT&T v. FCC* decision, cellular carriers offering PCS would have had difficulty "effectively and competitively respond[ing] to a private carrier PCS company's offering of discounted rates for large users or high volume users,"[166] since private carriers have unlimited freedom in pricing services and satisfying or denying requests for service. The tariffing requirement exacerbates the already considerable incongruities between common carriers and private carriers by further impeding the ability of common carrier PCS providers to respond promptly and innovatively to subscribers' needs and restraining pricing flexibility.

Second, the tariff filing obligations would diminish price competition by granting private carriers advance notice of any change in common carriers' PCS rates. As the Court of Appeals recognized, effective competition cannot occur in such a situation.

> While AT&T had to file all of its rates with the Commission, MCI did not, thus not only making it more difficult for AT&T to match MCI's rates . . . . but also enabling MCI and other competitors to entangle AT&T in burdensome proceedings before the Commission by filing oppositions to the rates AT&T filed.[167]

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[166] GTE at 53-54.

[167] Slip. Op. at 6 (citations omitted).

Third, administrative costs will necessarily increase for common carriers as they must now file and maintain accurate tariffs for a multitude of pricing arrangements. Unfortunately, these additional costs will likely be passed on to the consumer, making common carrier PCS an unattractive option. Alternatively, common carriers may opt to bear the full costs of tariffing themselves -- jeopardizing their financial stability in an effort to compete with private carrier PCS providers in the short term.

Accordingly, McCaw believes that the *AT&T v. FCC* decision compels levelling the regulatory playing field. Many parties have emphasized the importance of consistent regulatory ground rules for new and existing PCS providers.[168] Absent Commission action to ensure regulatory parity for all PCS participants, McCaw submits that the recent *AT&T v. FCC* decision will further impede full, fair and effective competition.

C. THE RECORD DEMONSTRATES THAT COMMISSION SHOULD ACT PROMPTLY ON THE *CELLULAR FLEXIBILITY PETITION*

Commenting parties have recognized the need for expeditious action on the pending *Cellular Flexibility Petition*.[169] As McCaw explained in its original comments, the *Cellular Flexibility Petition* proposes to allow cellular carriers expanded authority under the Cellular Service Option in Section 22.930 of the Commission's rules to offer non-common carrier

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[168] *See, e.g.*, McCaw at 44-49; Alltel at 16-17; APC at 49; Ameritech at 22-23; Bell Atlantic at 30-31; BellSouth at 65-66; CCI at 35-36; CTIA at 72-77; Centel at 24-26; Century at 12-13; CBT at 20-21; Ericsson at 27; GTE at 49-55; Metrocall at 18; OPASTCO at 18; NTIA at 39-40; PacTel at 43; Rural Cellular Corp. at 1; SNET at 8-9; SWB at 26-27; Sprint at 18-19; Telocator at 13-14; DOJ at 8-9; USTA at 35; Vanguard at 26-27.

[169] *See, e.g.*, McCaw at 45-47; Alltel at 7-8; CTIA at 19-20; Centel at 26-28; GTE at 52-53; Sprint at 18-19.

services utilizing cellular spectrum. Such services include, but are not limited to, wireless PBX offerings, campus cordless systems, types of information services, and specialized private offerings to individual customers or companies.

If new 2 GHz PCS carriers are authorized as private carriers, the relief sought in the *Cellular Flexibility Petition* is critical to allowing cellular carriers the ability to formulate adequate competitive responses to new 2 GHz offerings. While some changes to the cellular regulations are proposed in the *Notice*, as McCaw initially noted, these changes do little to contribute to cellular carriers' flexibility to compete with private carrier PCS offerings. Accordingly, even if the *Notice* changes are adopted, cellular carriers would still be constrained to only offering common carrier services. Under the circumstances, CTIA goes as far as stating if private carrier status is authorized for new entrants, "[a] realignment of cellular's regulatory status would not only be good policy, it would be legal imperative by operation of statutes and the Equal Protection Clause of the Fifth Amendment.[170]

Furthermore, in light of onerous state-initiated obligations now being placed upon existing wireless providers purportedly justified by common carrier resale obligations, a reexamination of cellular regulation under the *Cellular Flexibility Petition* would be particularly timely. Cellular carriers in California, for example, are required to develop unbundled wholesale rates and cannot "resell" such wholesale services on a retail basis unless such services are offered subject to a "break-even" requirement that includes a 14.75 percent

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[170] CTIA at 73.

rate of return.[171] Under the circumstances, cellular carriers will find it extremely difficult to compete with new PCS offerings regardless of new entrants' regulatory status.

In any event, and regardless of the regulatory model the Commission pursues for new licensed carriers, prompt action on the *Cellular Flexibility Petition* is warranted. The petition's proposals promise increased competition and increased spectrum efficiency. In addition, the changes proposed in the *Cellular Flexibility Petition* are needed to allow existing mobile providers to introduce a wide range of wireless offerings. Furthermore, since many of the policy considerations applicable to the regulatory status of new carriers also apply to new offerings by existing carriers, simultaneous consideration of both the regulatory regime for new carriers and existing carriers is simply good policy.

IV. COMMENTERS HAVE UNIVERSALLY AGREED THAT LICENSING RULES FOR PCS MUST ENSURE QUALIFIED LICENSEES AND DETER SPECULATION

There is widespread agreement among commenting parties that effective PCS licensing requirements must be imposed to guard against speculative abuse.[172] The record reveals a strong consensus that stringent anti-speculation measures should be taken to avoid a

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[171] *Investigation On the Commission's Own Motion Into the Regulation of Cellular Radiotelephone Utilities* at 59, Decision 92-10-026, Docket No. I.88-11-040 (Pub. Util. Comm'n of the State of California October 6, 1992).

[172] *See, e.g.*, McCaw at 37-39; Adelphia at 13-14; Ameritech at 36-40; AT&T at 36-39; Associated PCN at 16-19; Centel at 20-24; CBT at 16-19; Comments of Express Communications, Inc. at 12-13 ["Express"]; GTE at 55-60; MCI at 15; Metrocall at 9-11; Comments of Motorola, Inc. at 44 ["Motorola"]; Comments of Qualcomm Incorporated at 5 ["Qualcomm"]; Rolm at 27; Rural Cellular Corp. at 2; Comments of Teco Energy, Inc. at 2 ["Teco"]; TDS at 26-30; Telocator at 10-12; Time Warner at 19-23; USTA at 27-28; U S WEST at 15-18.

repetition of the earlier abuses that occurred in the licensing of land mobile services. Specifically, parties advocated measures such a strict financial entry requirements, demonstrations of technical feasibility, compliance with construction and initiation of service deadlines, and high filing fees. In addition, McCaw also proposes a measure to require new applicants to demonstrate financial ability to relocate any existing users in order to initiate service.

Strict Threshold Showings. Commenting parties advocated strict financial entry requirements citing the high costs of developing a microcellular PCS infrastructure, and the need to ensure, from early on in the application process, that applicants "are in a position to achieve actual deployment of PCS."[173] Submission of comprehensive engineering proposals demonstrating that an applicant has the technical and engineering capabilities to deliver its proposed service to the public within a reasonable timeframe would also aid in weeding out serious applicants from speculators by increasing the cost of speculation.[174]

High Initial Filing Fees. Parties were in general agreement that increased filing fees would also help winnow out marginal applicants by raising the overall costs of

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[173] Metrocall at 10; *see also* McCaw at 38; Adelphia at 14; Ameritech at 38-39; Associated PCN at 16-19; Centel at 22; Comcast at 27; Concord at 5; Express at 13-14; GTE at 57; MCI at 15; Metrocall at 10; Motorola at 44; OPASTCO at 15; Qualcomm at 5; Telocator at 11; USTA at 27-28; U S WEST at 16-17; UTC at 35-36; Vanguard at 28.

[174] *See, e.g.*, McCaw at 38; Ameritech at 39; Associated PCN at 16; Centel at 22; Century at 14; CBT at 17; Comcast at 27-28; Express at 13; GTE at 57; Motorola at 44; NRTA/OPASTCO at 15; Qualcomm at 5; USTA at 27-28; UTC at 35-36.

speculation.[175] Many pointed out that while higher application fees should not deter *bona fide* applicants, they may do much to discourage applications from those who had formerly filed simply because they had nothing to lose by doing so. As tersely summarized by one party, "[s]et the filing fees for PCS authorizations high enough . . . and speculation will be deterred."[176]

Construction Benchmarks. Deadlines for construction and initiation of service to the public would help to "ensure the rapid deployment of PCS services and . . . limit the possibility of spectrum hoarding."[177] Build-out requirements discourage speculation by ensuring that only those applicants seek licenses that are willing to invest substantial sums in the construction and operation of the systems they propose. Such requirements seek "to ensure that products and services are offered to consumers as quickly as possible" and minimize spectrum warehousing problems.[178]

Minimum Coverage Requirements. Many parties share McCaw's view that the Commission should consider imposing minimum service coverage requirements within authorized service areas and/or requirements for minimum provision of service to the public

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[175] *See, e.g.*, McCaw at 39; Adelphia at 14; APC at 43; Associated PCN at 17; AT&T at 5-6; Centel at 22; GTE at 57; Comments of Citizens Utility Company at 9 ["Citizens"]; Comments of Corporate Technology Partners at 24 ["CTP"]; Express at 12; MCI at 15; Motorola at 44; Pass Word at 8; Rolm at 27; Telocator at 11; UTC at 36.

[176] Express at 12.

[177] Metrocall at 10; *see also* McCaw at 38-39; Adelphia at 14; AT&T at 5-6; Ameritech at 39-40; Associated PCN at 19-20; Centel at 22; CBT at 18-19; Comcast at 30-31; Concord at 5; Comments of dbx Corporation at 16 ["dbx"]; Express at 14; GTE at 57; Lincoln at 12; MCI at 15; Motorola at 44; OPASTCO at 15; Rolm at 27-28; Telocator at 11; USTA at 27-28; U S WEST at 17; UTC at 36.

[178] U S WEST at 17.

such as those imposed on cellular licensees.[179] As McCaw pointed out in its opening comments, minimum coverage and service requirements promote the Commission's goals of universality of service and rapid deployment "by ensuring that PCS is rapidly offered to a substantial number of users and that PCS spectrum is not warehoused."[180] Rules establishing minimum geographic or population coverage benchmarks together with those setting initial construction deadlines and the initiation of service to the public, "will help to ensure the sincerity of PCS applicants and aid in obtaining the prompt initiation of service."[181]

Ability to Finance Relocation Costs. Upon review of the record in this docket, McCaw is convinced that not only should financial qualifications be required, they must be strengthened to include a demonstration of an applicant's financial ability to compensate existing 2 GHz licensees for the costs of relocation. Given the costs of relocation,[182] it is vitally important that PCS applicants be required to file a detailed business plan, demonstrating both the number of links that must be relocated to launch the applicant's new service and the applicant's financial ability to compensate existing microwave users for the relocated links. Without such a required financial showing, the Commission risks granting licenses to applicants who -- lacking the financial resources to gain access to the spectrum by

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[179] *See, e.g.*, McCaw at 38-39; APC at 60; Centel at 22; CBT at 18; PerTel at 16; U S WEST at 17.

[180] McCaw at 39.

[181] Centel at 22.

[182] OET has estimated the costs of relocating one incumbent licensees at approximately $100,000 per link, which may be low. *OET Report* at 32.

relocating the existing users -- "sit" on their authorizations instead of building and operating the proposed systems.

V. CONCLUSION

McCaw believes that the industry, government agencies, and the FCC's own Office of Plans and Policy have thoroughly demonstrated the benefits of creating a robustly competitive market for 2 GHz PCS offerings that will not require continuing regulatory oversight to ensure low rates, high quality, diversity, ubiquity, and speed of deployment. In furtherance of this goal, the comments demonstrate support for authorizing at least 5 licensed PCS operators with 20 MHz each; utilizing MSA and RSA market divisions for licensing; neither favoring nor discouraging any potential competitor from providing service; adopting licensing reforms designed to accurately reflect requirements for providing PCS and ensuring qualified applicants; and developing regulatory ground rules ensuring comparable treatment

of new and existing wireless services. By pursuing this approach, the Commission will best ensure fulfillment of its stated objectives for PCS and hasten the arrival of new communications services for the public.

Respectfully submitted,

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